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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1802

FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO,
a National Banking Association,
Petitioner,

vs.

DAKOTA NATIONAL BANK AND TRUST CO.,
a National Banking Association,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
Introductory Note	1
Citation to Opinion Below	2
Statement of the Case	2
A. Statement of Facts	2
B. Supplemental History of Litigation	2
Reasons for Not Granting the Writ	4
1. The Decision of the Eighth Circuit Is in Harmony With the Holdings of This Court and Is Not at Odds With the Decisions of Other Circuits	4
2. The Eighth Circuit Correctly Held That a Determination of Law by the Comptroller Is Judicially Reviewable on a De Novo Basis	8
3. The Eighth Circuit's Holding That the Existence of the Bank of North Dakota Does Not Provide National Banks With Unlimited Branching Authority in North Dakota Provides No Basis for Writ Review	9
Conclusion	11

Table of Authorities

Cases:

Camp v. Pitts, 411 U.S. 138 (1973) 8

Central Bank v. Smith, 532 F.2d 37 (7th Cir. 1976) 6

First National Bank v. Dickinson, 396 U.S. 122 (1969)..4, 5, 8

Independent Bankers Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir. 1976) cert. denied — US — (1977) ... 6

Nebraskans for Independent Banking v. Omaha National Bank, 530 F.2d 755 (1976) vacated and remanded 426 US 310 (1976) 5, 7

North Davis Bank v. First National Bank of Layton, 457 F.2d 820 (1972) 5

Seattle Trust & Savings Bank v. Bank of California, 492 F.2d 48 (1977) 8

Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank, 515 F.2d 154 (1975) cert. denied 423 US 869 (1975) 6

Statutes:

12 U.S.C. § 36 ..... 5, 8

12 U.S.C. § 36(f) 4, 5, 8

N.D.C.C. Chapter 6-09 9

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INTRODUCTORY NOTE

In this brief, Dakota National Bank and Trust Co., respondent, will be referred to as "Dakota National". Robert Bloom, acting Comptroller of the Currency, will be referred to as "Comptroller". First National Bank and Trust Company of Fargo, petitioner, will be referred to as "First National". First National's drive-in walk-up facility located at 404 Main Avenue,

Fargo, North Dakota, will be referred to as the "Auto Bank" and the First National facility located at 2737 South University Drive in Fargo, North Dakota, will be referred to as the "Southside Bank". Appendix page references in this brief are to the appendix included in the petition filed by First National in this court.

CITATION TO OPINION BELOW

Subsequent to the filing of First National's petition the decision of the United States Court of Appeals for the Eighth Circuit was reported at 554 F.2d 345.

STATEMENT OF THE CASE

A. Statement of Facts.

The statement of facts included in First National's statement of the case omits relevant facts and contains inaccuracies. The decision by the Eighth Circuit includes a complete and accurate recitation of the facts giving rise to this litigation and accordingly, is adopted by reference as Dakota National's statement of facts. See 554 F.2d 345, 348-580 and A.-4 through 9.

B. Supplemental History of Litigation.

Particularly as it relates to the basis for the Eighth Circuit Decision, First National's "history of litigation" is distorted. Since this Court has the Eighth Circuit decision before it, Dakota National does not believe that it is necessary to correct those distortions at this point in the brief.

On June 20, 1977, First National filed its petition for a writ with this Court. Thereafter the Solicitor General on behalf

of the Comptroller applied for an extension of time to and including August 12, 1977, within which to file a petition for a writ of certiorari. On July 5, 1977, Mr. Justice Blackmun signed an appropriate order granting the Solicitor General's application. On July 11, 1977, Dakota National filed its application for an extension of time until September 12, 1977, within which to file its brief in opposition to the petition for writ of certiorari, which application was also approved. The Solicitor General has failed to file a petition on behalf of the Comptroller and the August 12th, 1977 deadline for doing so has long since expired.

REASONS FOR NOT GRANTING THE WRIT

1. The Decision of the Eighth Circuit Is in Harmony With the Holdings of This Court and Is Not at Odds With the Decisions of Other Circuits.

First National apparently contends that contrary to *First National Bank v. Dickinson*, 396 U.S. 122 (1969), the Eighth Circuit relied upon North Dakota law in determining that the Auto Bank was a branch under § 36(f) of the McFadden Act. [12 U.S.C. 36(f)]. The Eighth Circuit did no such thing. At page 351 of its decision (544 F.2d 345) the Court stated:

> "[3] First National Bank v. Dickinson, 396 U.S. 122, 134, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969) established that the definition of a branch bank is a threshold question to be determined as a matter of federal law. Two elements comprise the federal definition of branch bank as outlined by the Court in First National Bank v. Dickinson, supra, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312; they relate generally to (1) the types of services offered and (2) to the location of a facility.
>
> "The Supreme Court's judicial construction of 'branch' emanates from the federal statute which provides:
>
> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent.
>
> "McFadden Act, 12 U.S.C. § 36(f)."

After a detailed analysis as to why First National's Auto Bank was a branch, as a matter of federal law, the Eighth Circuit reiterated:

> "However, we reemphasize that the primary determination of whether or not that facility is a branch is a matter of federal law." 554 F.2d 345, 354.

Without question the Auto Bank is a branch under the definition of branch included in § 36(f) of the McFadden Act [12 U.S.C. 36(f)] and as judicially construed by this Court in *First National Bank v. Dickinson*, supra, 396 U.S. 122. What the Eighth Circuit refused to do here and in its earlier decision in *Nebraskans for Independent Banking v. Omaha National Bank*, 530 F.2d 755 (1976) vacated and remanded, 426 U.S. 310 (1976), was to weaken the doctrine and policy of competitive equality established by the McFadden Act. The Eighth Circuit limited and subordinated the utilization of the standards that have been fashioned by the Comptroller for use in determining whether a particular facility is a branch or not. Thus, the Eighth Circuit held that the Comptroller's standards could not be used to sustain the Comptroller's conclusion that the Auto Bank was not a branch in the face of the federal statutory definition of "branch" included in 12 U.S.C. 36, and the doctrine of competitive equality.

The Eighth Circuit decisions do not totally discard utilization of the Comptroller's standards to determine whether a particular facility is a branch or not. But their use is restricted by requiring a threshold determination that a state banking association would be permitted to establish a like facility.

A review of the decisions of other circuits, cited by First National in its petition, shows that there is no conflict with the Eighth Circuit.

In *North Davis Bank v. First National Bank of Layton*, 457 F.2d 820 (1972) the Tenth Circuit in affirming that the facility in question was not a branch carefully noted at p. 824:

> "It affords no competitive advantage as apparently such arrangements are not prohibited by Utah law."

In *Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank*, 515 F.2d 154 (1975), cert. denied, 423 U.S. 869 (1975), the Fourth Circuit noted that the facility in question was authorized under both state and federal law.

Central Bank v. Smith, 532 F.2d 37 (7th Cir. 1976) relates to the issuance of a bank charter rather than a branch certificate. Dakota National is unable to ascertain how the decision conflicts with the Eighth Circuit decision in this case.

Nor does *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), cert. denied — U.S. — (1977), demonstrate any conflict. Indeed, at page 935 of the decision the Court noted:

> "[9] The same admonition applies with equal force to the facts of the instant case: Again we are confronted with an attempt to secure for national banks branching privileges which many states deny to competing state banks. The utility of CBCT's is obvious; several states permit state-chartered banks to use this eminently sensible mode of operations, but the policy of those states who choose to prohibit CBCT's is not open to judicial review or to modification by the Comptroller. The policy of competitive equality defers to state standards, not to standards prescribed by the Comptroller."

Neither the decisions of this Court nor the decisions of other circuits are in conflict with the decision of the Eighth Circuit in this case. None of the Courts of Appeal have approved, expressly or implicitly, the standards which the Comptroller has fashioned for determining whether a particular facility is a branch bank or not, where application of those standards would permit a national bank to operate a facility prohibited to a state banking association under state law.

In vacating the Eighth Circuit judgment in *Nebraskans*, supra, this Court stated at 426 U.S. 310-11:

> "From the time petitioner Omaha Natioinal Bank sought approval from the Regional Administrator of National Banks of its drive-in/walk-in facility until after the en banc decision of the Court of Appeals, Nebraska law permitted a state-chartered bank to operate one 'attached auxiliary teller office' and not more than two 'detached auxiliary teller offices.' Neb Rev Stat § 8-157(2) (1974). The two types of 'auxiliary teller offices' were defined in Nebraska Department of Banking Reg § 8-157-01 (1970). The Court of Appeals found it 'abundantly clear' that a state bank situated like Omaha National would not be permitted to operate the added facility, and ruled that under 12 USC § 36 [12 USCS § 36], see First Nat. Bank v. Dickinson, 396 US 122, 135, 24 L Ed 2d 312, 90 S Ct 337 (1969), the facility was a branch which the bank was not permitted to operate. 530 F2d 755, 762 (CA8 1976).
>
> "Since the en banc decision, § 8-157(2) has been amended by Legislative Bill 763, approved by the Governor on March 11, 1976, to redefine 'auxiliary teller' facilities which state banks may operate. It appearing that this amendment, which will become effective in July 1976, may have a substantial bearing on the outcome of this case, the petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of Legislative Bill 763. "So ordered."

First National has suggested in its petition that vacation and remand in *Nebraskans*, supra, supports its claim of error here by the Eighth Circuit. The opposite inference is suggested by this Court's action. Otherwise, why would the Eighth Circuit be directed to reconsider its decision in light of a change in Nebraska law? Under the Comptroller's standards, state law does

not come into play at all in resolving whether a particular facility is or is not a branch.

Without question the Eighth Circuit has remained faithful to both the federal definition of "branch" included in 12 U.S.C. § 36, see *First National Bank of Dickinson*, 396 U.S. 122, 135 (1969) and the doctrine of "competitive equality." The petition should not be granted.

2. **The Eighth Circuit Correctly Held That a Determination of Law by the Comptroller Is Judicially Reviewable on a De Novo Basis.**

Camp v. Pitts, 411 U.S. 138 (1973) involved the standards of review applicable to the exercise of discretionary power by an administrative agency. The status of the Auto Bank as a branch under 12 U.S.C. § 36(f) is a question of law and resolution of that question does not involve the exercise of discretionary power by the Comptroller. Accordingly, the Comptroller's legal conclusion is not reviewable under the "arbitrary and capricious" standard as argued by First National. The correct standard is as suggested by the Ninth Circuit in *Seattle Trust & Savings Bank of California*, 492 F.2d 48 at 50 (1977):

> "The arbitrary and capricious standard has been judicially fashioned to protect against the wrongful exercise of discretion by the Comptroller regarding factual controversies. In this case, however, the principal issue was whether the Comptroller has acted within the limitations imposed upon him by federal and state law, not whether he has acted reasonably or unreasonably. If the Comptroller was incorrect in his interpretation of the law, he should have been overruled in the District Court. First National Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343, reh. den., 385 U.S. 1032, 87 S.Ct. 738, 17 L.Ed.2d 680 (1966). This standard of review has been customarily applied to cases involving interpretation of 12 U.S.C.A. §36(c). See First National Bank v. Dickinson, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1966)."

The Eighth Circuit properly reviewed the Comptroller's interpretation of law on a *de novo* basis. Since he was incorrect with respect to the law it is immaterial whether the Comptroller acted reasonably or unreasonably.

3. **The Eighth Circuit's Holding That the Existence of the Bank of North Dakota Does Not Provide National Banks With Unlimited Branching Authority in North Dakota Provides No Basis for Writ Review.**

The State of North Dakota, as an exercise of its sovereign power engages in banking as the Bank of North Dakota. Neither the District Court nor the Eighth Circuit reached the issue as to whether its implementing legislation (Chapter 6-09 of the North Dakota Century Code) authorizes the Bank of North Dakota to engage in branch banking.[1]

First National simply asks this Court to assume that the Bank of North Dakota enjoys unlimited branching authority. Such an assumption is hardly justified and furthermore is unnecessary in light of the disposition of this issue by the Eighth Circuit in this case. The Eighth Circuit said:

> "The McFadden Act provides the following definition of a 'state bank' for the purposes of this Act:
>
> "The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust com-

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[1] The District Court did observe in passing that the Bank of North Dakota has operated only one banking facility since its inception. (See A. 54, fn. 9)

panies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

"12 U.S.C. § 36(h). The definition obviously does not address the specific problem of a state-owned bank as a bank operating 'under the authority of State laws.' However, the character of the Bank of North Dakota, as interpreted by the District Court and with which we agree, is that of an agency of the sovereign power. It is in effect an arm of the state of North Dakota. It would be inimical to the policy of competitive equality to accord privately-owned, nationally-chartered banks the same privileges given to the sovereign when they are denied to privately-owned, state-chartered banks. We are persuaded that competitive quality was intended to be maintained between the privately-owned banking institutions, state and federal, rather than between the national banks and the state itself in its banking endeavors. As such, we do not include the Bank of North Dakota within the definition or meaning of §§ 36(h) or 36(c). We express no opinion as to whether the Bank of North Dakota has unlimited branching powers under state law." (*Nebraskans*, supra at 356)

CONCLUSION

Apparently upon reflection, the Solicitor General, on behalf of the Comptroller, has determined that the decision by the Eighth Circuit does not warrant review. In submitting its petition for a writ of certiorari, First National has advanced no special or important reasons for granting a writ in this case. None exists. Accordingly, Dakota National respectfully requests that the petition for writ be denied.

Dated this 12th day of September, 1977.

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